

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

VICTOR PARRA, Jr.,

Plaintiff,

R. HERNANDEZ, et al.,

### Defendants.

Civil No. 08cv0191 H (CAB)

## **REPORT AND RECOMMENDATION REGARDING:**

**REGRADING:**  
**(1) DEFENDANTS COWAN,  
HERNANDEZ, LIMON, AND LILES'  
MOTION TO DISMISS THE  
COMPLAINT; AND**  
**(2) DEFENDANT CDCR'S MOTION TO  
DISMISS THE COMPLAINT**  
[Doc. Nos. 12, 14.]

## I. INTRODUCTION

Plaintiff Victor Parra, Jr., a state prisoner proceeding *pro se*, has filed a civil rights action pursuant to 42 U.S.C. § 1983. On May 23, 2008, Defendants P. Cowan, R. Hernandez, R. Limon, and W. Liles, employees of the California Department of Corrections and Rehabilitation at R.J. Donovan State Prison, moved to dismiss all claims against Defendants Limon and Liles, and certain claims against Defendants Cowan and Hernandez. On July 10, 2008, Defendant California Department of Corrections and Rehabilitation (“CDCR”), a state agency, moved to dismiss the Complaint as it pertains to Defendant CDCR.<sup>1</sup> Plaintiff did not submit an opposition.

<sup>1</sup> Defendant CDCR was not part of the original motion to dismiss because it was not served with the Complaint until July 7, 2008. [See Doc. No. 15 at 2.] Additionally, although the Complaint also named A.L. Cota as a defendant, this individual has not yet been served. On July 14, 2008, this Court granted Plaintiff an extension until September 10, 2008, to serve A.L. Cota. [Doc. No. 18.]

1       For the reasons that follow, this Court recommends Defendants' motion be **GRANTED**.  
 2 Furthermore, this Court recommends the state law causes of action against Defendant CDCR be  
 3 **DISMISSED sua sponte without leave to amend**, and that Defendant CDCR's motion to dismiss  
 4 therefore be **DENIED as moot**.

## 5           **II. BACKGROUND**

6       At all relevant times, Plaintiff was incarcerated at R.J. Donovan State Prison ("Donovan"). The  
 7 Complaint and attached exhibits<sup>2</sup> allege the following facts:

8       Plaintiff has an anxiety disorder and at the time of the incident was classified as having safety  
 9 concerns. (Complaint at ¶¶ 2, 11.) On or about September 28, 2006, Plaintiff, who had been housed in  
 10 administrative segregation, was ordered by Defendants Limon and Liles to double cell with inmate  
 11 Duran.<sup>3</sup> (Complaint at ¶ 2.) Inmate Duran was classified as a general population inmate. (Complaint at  
 12 ¶ 1.) Plaintiff had double celled with at least two other general population inmates in the past without  
 13 incident. (Complaint at ¶ 49.) Defendant Limon notified Plaintiff that Operational Plan #85 required  
 14 inmates to double cell, and that he would be issued a Rule Violation Report ("RVR") if he did not sign  
 15 the agreement. (Complaint at ¶ 5; Plaintiff's Exhibit A ("Exhibit A").)

16       Plaintiff told Defendant Limon that Inmate Duran was not compatible with Plaintiff because he  
 17 belonged to a different yard group. (Complaint at ¶ 4.) Plaintiff was told that if he did not sign a  
 18 double-cell agreement he would be placed on a yard-hold and moved to Unit 8, where no yard, library, or  
 19 other state created services were available. (Complaint at ¶ 3.) Plaintiff agreed to double-cell with  
 20 inmate Duran, but would not sign the corresponding double-cell agreement form. (Complaint at ¶ 6.)

21       On or about September 28, 2006, Plaintiff was placed on a yard-hold. (Plaintiff's Exhibit B at 3  
 22 ("Exhibit B").) On October 4, 2006, Plaintiff was formally issued a RVR for "refusing an order to  
 23 double cell." (Exhibit A.) On October 9, 2006, Plaintiff was transferred to Unit 8. (Exhibit B at 3.) On

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24  
 25       <sup>2</sup> When a complaint is accompanied by attached documents, the documents are part of the  
 26 complaint and may be considered in determining whether the plaintiff can prove any set of facts in  
 27 support of the claim. *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991). If the allegations  
 in the complaint are refuted by an attached document, the court need not accept the allegations as being  
 true. *Id.*

28       <sup>3</sup> The Complaint states the incident occurred on September 25, 2006, but based on Plaintiff's  
 Exhibit A, it appears the incident actually occurred on September 28, 2006.

1 October 10, 2006, Plaintiff received a copy of the RVR. (Exhibit A.) On October 30, 2006, a hearing  
 2 was held on the RVR and the reviewing officer found Plaintiff not guilty of refusing to obey an order to  
 3 double-cell because: (1) Plaintiff was in compliance with the order at the time of the hearing; and (2)  
 4 Plaintiff's claims of incompatibility were not checked against all available sources of information  
 5 because the officers only checked against his administrative segregation file, not his central file. (*Id.*)  
 6 The senior hearing officer determined that further disciplinary action against Plaintiff was unnecessary  
 7 and dismissed the RVR. (*Id.*)

8 From on or about September 28, 2006, to January 1, 2007, while he was on a yard-hold and  
 9 during his subsequent housing in Unit 8, Plaintiff was not allowed in the exercise yard. (Complaint at ¶¶  
 10 6, 8, 24-25.) He was also denied access to the law library and recreational reading books. (Complaint at  
 11 ¶ 43.) From January 1, 2007, to April 2007, Plaintiff was housed in Unit 7, where he was allowed less  
 12 than 5 hours in the exercise yard per week. (Complaint at ¶ 15.)

### 13 III. DISCUSSION

14 With respect to the above facts, Plaintiff alleges numerous claims for violations of his rights  
 15 under the First, Fourth, Eighth, and Fourteenth Amendments, as well as several state law causes of  
 16 action. Defendants move to dismiss all claims against Defendants Limon, Liles, and the CDCR, and the  
 17 sixth, eighth, ninth, sixteenth, and seventeenth causes of action against Defendants Hernandez and  
 18 Cowan. Defendants do not move to dismiss the second, eleventh, twelfth, thirteenth, and fourteenth  
 19 causes of action against Defendants Hernandez and Cowan.

#### 20 A. Legal Standard

21 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for "failure to state a claim upon  
 22 which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A Rule 12(b)(6) dismissal motion 'can be  
 23 granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her  
 24 claim.'" *Holley v. Crank*, 400 F.3d 667, 674 (9th Cir. 2005) (internal citation omitted). "All allegations  
 25 of material fact are taken as true and construed in the light most favorable to the nonmoving party."  
 26 *Tanner v. Heise*, 879 F.2d 572, 576 (9th Cir. 1989). The dispositive issue is "not whether a plaintiff will  
 27 ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Jackson*  
 28 *v. Carey*, 353 F.3d 750, 755 (9th Cir. 2003) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

Civil rights complaints are construed liberally. *See Holley*, 400 F.3d at 674. Moreover, courts "have an obligation where the petitioner is *pro se*, particularly in civil rights cases, to construe the pleadings liberally and to afford the petitioner the benefit of any doubt." *Bretz v. Kelman*, 773 F.2d 1026, 1027 (9th Cir. 1985) (*en banc*) (internal citation omitted). "However, a liberal interpretation of a civil rights complaint may not supply essential elements of the claim that were not initially pled." *Ivey v. Board of Regents of University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982) (internal citation omitted). Furthermore, courts do not assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

## **B. Count One**

Plaintiff alleges claims against Defendants Limon and Liles for cruel and unusual punishment in violation of the Eighth Amendment and retaliation in violation of the First Amendment.

### **1. Eighth Amendment Deprivation of Humane Conditions of Confinement**

Plaintiff alleges Defendants Limon and Liles violated his rights under the Eighth Amendment when they issued him a RVR, which he claims effectively deprived him of time in the outdoor exercise yard.<sup>4</sup> (Complaint at ¶ 7.) The Eight Amendment imposes a duty on prison officials to ensure that inmates receive adequate food, clothing, shelter, and medical care. *Hearns v. Terhune*, 413 F.3d 1036, 1042 (9th Cir. 2005). Additionally, "[e]xercise has been determined to be one of the basic human necessities protected by the Eighth Amendment," and a long-term deprivation of outdoor exercise for inmates is unconstitutional. *LeMaire v. Maass*, 12 F.3d 1444, 1457-58 (9th Cir. 1993); *see also Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (declaring unconstitutional the deprivation of outdoor

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<sup>4</sup> In their Motion, in addition to addressing this claim, Defendants also argue that Plaintiff's housing assignment with Inmate Duran did not constitute a failure-to-protect under the Eighth Amendment. (Motion at 6.) However, Plaintiff does not appear to raise such a claim in his Complaint. While Plaintiff does express concerns regarding his fear of assault by Inmate Duran, the totality of his allegations demonstrate his claim is for deprivation of humane conditions of confinement related to the denial of outdoor exercise. Specifically, he alleges Defendants Limon and Liled violated his rights under the Eighth Amendment when they: (1) "enforced Operational Plan #85 and effectively deprive [sic] Plaintiff of outdoor exercise yard from September 25, 2006 to April 2007," (Complaint at ¶ 7); (2) were "deliberate [sic] indifferent when they new [sic] Plaintiff would receive no yard and his mental illness posed a risk in a 24 hour lockdown, like Unit 8," (Complaint at ¶ 17); and (3) "deprived Plaintiff of a basic human need of exercise in an outdoor yard ....," (Complaint at ¶ 19). In any event, to the extent Plaintiff sought to allege a failure-to-protect claim, this Court recommends the claim be **DISMISSED** for failure to comply with Federal Rule of Civil Procedure 8. *See McHenry v. Renne*, 84 F.3d 1172, 1179-80 (9th Cir. 1996). Accordingly, this Court need not address the failure-to-protect issue.

1 exercise for inmates held longer than four years); *Allen v. Sakai*, 48 F.3d. 1082, 1087 (9th Cir. 1994)  
 2 (holding a plaintiff made an objective showing of an Eighth Amendment violation where he was only  
 3 allowed outside for 45 minutes per week during a six-week period). However, “[t]he Eighth  
 4 Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual  
 5 ‘punishments.’” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); see also *Wilson v. Seiter*, 501 U.S. 294,  
 6 299-302 (1991) (rejecting a reading of the Eighth Amendment that would allow liability to be imposed  
 7 on prison officials solely because of the presence of objectively inhumane prison conditions).

8 A plaintiff alleging deprivation of humane conditions of confinement must not only make an  
 9 objective showing that the deprivation was “sufficiently serious” to form the basis for an Eighth  
 10 Amendment violation, but also a subjective showing that the prison official acted “with a sufficiently  
 11 culpable state of mind.” *Wilson*, 501 U.S. at 298. The subjective requirement, relating to a prison  
 12 official’s state of mind, requires deliberate indifference. *Lopez v. Smith*, 203 F.3d 1122, 1133 (9th Cir.  
 13 2000) (en banc). “[T]he official must be both aware of facts from which the inference could be drawn  
 14 that a substantial risk of serious harm exists, and he must also draw the inference.” *Farmer*, 511 U.S. at  
 15 837. “[A]n official’s failure to alleviate a significant risk that he should have perceived but did not,  
 16 while no cause for commendation, cannot under our cases be condemned as the infliction of  
 17 punishment.” *Id.* at 838.

18 Finally, in order to show causation between the deliberate indifference and the Eighth  
 19 Amendment deprivation, a prisoner-plaintiff must demonstrate the individual defendant was in a  
 20 position to take steps to avert the harm, but failed to do so intentionally or with deliberate indifference.  
 21 *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). This inquiry requires “a very individualized  
 22 approach which accounts for the duties, discretion, and means of each defendant.” *Id.* at 633-34.

23 Here, assuming *arguendo* Plaintiff alleges a deprivation of humane conditions that is  
 24 “sufficiently serious,” he fails to establish either deliberate indifference on the part of Defendants Limon  
 25 and Liles or a causal link between the alleged deliberate indifference and the Eighth Amendment  
 26 violation. Defendants Limon and Liles issued Plaintiff a RVR when he refused an order to double-cell.  
 27 (Exhibit A.) Plaintiff claims the issuance of the RVR “effectively deprive [sic] Plaintiff of outdoor  
 28 exercise yard from September 25, 2006 to April 2007.” (Complaint at ¶ 7.) However, there are no

1 allegations in the Complaint which indicate that Defendants Limon and Liles, corrections officers, were  
 2 responsible for the alleged conditions in Unit 8 which form the basis of this claim, nor that they were  
 3 responsible for the decision to retain Plaintiff in Unit 8 for an extended period of time.

4 Because Defendants Limon and Liles were not responsible for the conditions in Unit 8, and the  
 5 alleged restrictions on outdoor exercise time in particular, they could not have “fail[ed] to alleviate” the  
 6 risk so as to establish either deliberate indifference. *See Farmer*, 511 U.S. at 837. Nor was the issuance  
 7 of the RVR by Defendants Limon and Liles the actual and proximate cause of the alleged Eighth  
 8 Amendment deprivation. *See Leer*, 844 F.2d at 633-34. Accordingly, this Court recommends  
 9 Defendants’ motion be **GRANTED** and the Eight Amendment claim listed in Count One be  
 10 **DISMISSED.**

## 11       **2. First Amendment Retaliation**

12 Plaintiff alleges Defendants Limon and Liles retaliated against him in violation of the First  
 13 Amendment when they issued him a RVR in response to his refusal to sign the double cell agreement  
 14 form. (Complaint at ¶ 9.) Within the prison context, a claim of First Amendment retaliation contains  
 15 five basic elements: (1) a state actor took an adverse action against the plaintiff; (2) because of; (3) the  
 16 plaintiff’s protected conduct; and that such action (4) chilled the plaintiff’s exercise of his First  
 17 Amendment rights; and (5) the action did not reasonably advance a legitimate correctional goal. *Rhodes*  
 18 v. *Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). In regards to the fourth element, the Ninth Circuit  
 19 has indicated an allegation of “harm that is more than minimal,” may suffice if a plaintiff fails to allege a  
 20 chilling effect. *Id.* at 567 n.11. Finally, Prisoner retaliation claims should be evaluated in light of *Sandin*  
 21 v. *Conner*, 515 U.S. 472 (1995), in which the Supreme Court expressed disapproval of excessive judicial  
 22 involvement in day-to-day prison management.<sup>5</sup> *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995).

23 Here, Plaintiff was issued an RVR when he refused an order to double-cell, pursuant to  
 24 Operational Plan #85. (Exhibit A.) While a prisoner’s First Amendment right extends to established  
 25 prison grievance procedures, *see Bradley v. Hall*, 64 F.3d 1276, 1279 (9th Cir. 1995), Plaintiff’s refusal  
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27       <sup>5</sup> In particular, the Supreme Court noted “the view expressed in several of our cases that federal  
 28 courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile  
 environment,” especially with regard to “the fine-tuning of the ordinary incidents of prison life, a  
 common subject of prisoner claims” under section 1983. *Sandin*, 515 U.S. 482-83.

1 to comply with an order to double-cell, especially when evaluated in light of *Sandin*, is not protected  
 2 conduct for purposes of a First Amendment retaliation claim. Accordingly, this Court recommends  
 3 Defendant's motion be **GRANTED** and the First Amendment claim listed in Count One be  
 4 **DISMISSED**. Furthermore, it is appropriate to dismiss the First Amendment claim against Defendants  
 5 Limon and Liles **without leave to amend** because the pleading could not be cured by the allegation of  
 6 other facts. *See Lopez*, 203 F.3d at 1130.

#### 7 C. Counts Two and Three

8 In Counts Two and Three, Plaintiff again alleges claims against Defendants Limon and Liles for  
 9 violations of his rights under the Eighth Amendment, based on the conditions of his confinement in Unit  
 10 8. However, for the reasons discussed above in regards to Count One, Plaintiff fails to state a claim for  
 11 deprivation of humane conditions of confinement against these defendants because Plaintiff has failed to  
 12 demonstrate either deliberate indifference or that Defendants Limon and Liles were the actual and  
 13 proximate cause of the Eighth Amendment deprivation. Accordingly, this Court recommends  
 14 Defendants' motion be **GRANTED** and the claims against Defendants Limon and Liles listed in Counts  
 15 Two and Three be **DISMISSED**.

#### 16 D. Count Four

17 Plaintiff alleges Defendants Limon and Liles violated his Fourth Amendment rights when they  
 18 transferred Plaintiff from his cell in Unit 6 to Unit 8. However, this claim is without merit because the  
 19 transfer of an inmate within a prison does not violate his Fourth Amendment rights. *Rizzo v. Dawson*,  
 20 778 F.2d 527, 530 (9th Cir. 1985). As a result, this Court recommends Defendants' motion be  
 21 **GRANTED** and the Fourth Amendment listed in Count Four be **DISMISSED**. Furthermore, it is  
 22 appropriate to dismiss the Fourth Amendment claims against Defendants Limon and Liles **without leave**  
 23 **to amend** because the pleading could not be cured by the allegation of other facts. *See Lopez*, 203 F.3d  
 24 at 1130.

#### 25 E. Counts Five and Seven

26 Plaintiff alleges Defendants Limon and Liles violated his Fourteenth Amendment due process  
 27 rights when they issued him a RVR because it resulted in a yard-hold and subsequent transfer to Unit 8,  
 28 which he claims imposed an atypical and significant hardship. In the prison context, the United States

1 Supreme Court has significantly limited the instances in which due process can be invoked. Although  
2 prisoners do not shed all constitutional rights at the prison gate, *Wolff v. McDonnell*, 418 U.S. 539, 555  
3 (1974), “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges  
4 and rights, a retraction justified by the considerations underlying our penal system,” *Jones v. North*  
5 *Carolina Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977) (quotations omitted).

6 “Discipline by prison officials in response to a wide range of misconduct falls within the  
7 expected perimeters of the sentence imposed by a court of law.” *Sandin v. Conner*, 515 U.S. 472, 485  
8 (1995). As a result, constitutionally protected liberty interests are “limited to freedom from restraint  
9 which . . . imposes atypical and significant hardships on the inmate in relation to the ordinary incidents  
10 of prison life.” *Id.* at 484; *See also May v. Baldwin*, 109 F.3d 557, 565 (9th Cir. 1997) (convicted  
11 inmate’s due process claim fails because he has no liberty interest in freedom from state action taken  
12 within sentence imposed and administrative segregation falls within the terms of confinement ordinarily  
13 contemplated by a sentence) (quotations omitted); *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998)  
14 (finding a two and a half year term in administrative segregation did not constitute an “atypical and  
15 significant” hardship). The state does not create protectable liberty interests by way of mandatory  
16 language in prison regulations. *Sandin*, 515 U.S. at 481-84.

17 Here, Plaintiff claims he had a constitutionally protected liberty interest in not being placed on a  
18 yard-hold or sent to Unit 8 because the conditions in Unit 8 constituted an atypical and significant  
19 hardship. On or about September 28, 2006, Plaintiff was placed on a yard-hold when he allegedly  
20 refused an order to double-cell. (Exhibit A.) On October 4, 2006, Plaintiff was formally issued a RVR  
21 for his refusal to obey an order to double-cell, pursuant to Operational Plan #85. (Exhibit A.) On  
22 October 9, 2006, he was transferred to Unit 8, which is apparently a punitive housing unit. (Exhibit B at  
23 3.) While the RVR was pending, Plaintiff was denied outdoor exercise, access to the law library, and  
24 recreational reading books. (Complaint at ¶ 43.) On October 30, 2006, a hearing was held on the RVR.  
25 (Exhibit A.) At the hearing, the reviewing officer found Plaintiff not guilty of refusing to obey an order  
26 to double-cell, dismissed the RVR, and determined that further disciplinary action against Plaintiff was  
27 unnecessary. (*Id.*) Thus, although Plaintiff claims the issuance of the RVR denied him outdoor exercise  
28 for approximately 80 days, it appears he was denied outdoor exercise for only 32 days on account of the

1 RVR, and that the decision to retain Plaintiff in Unit 8 after the hearing was unrelated to the original  
2 RVR.

3 As a preliminary matter, Plaintiff's yard-hold and subsequent 21-day stay in the punitive housing  
4 unit, while the RVR was pending, did not constitute an atypical and significant hardship in relation to  
5 the ordinary incidents of prison life. The punishment of incarcerated prisoners, in response to a wide  
6 range of misconduct, "falls within the expected perimeters of the sentence imposed by a court of law."  
7 *Sandin*, 515 U.S. at 485 (finding a prisoner's placement in disciplinary segregation for 30 days was not  
8 an atypical and significant hardship). Thus, the placement of a prisoner in a punitive housing unit or  
9 ordering a yard-hold while a disciplinary report is pending does not constitute an atypical and significant  
10 hardship in relation to the ordinary incidents of prison life. *Cf. Rhodes v. Chapman*, 452 U.S. 337, 347  
11 (1981) ("To the extent [prison] conditions are restrictive and even harsh, they are part of the penalty that  
12 criminal offenders pay for their offenses against society.") However, assuming *arguendo* Plaintiff had a  
13 constitutionally protected liberty interest in not being placed on a yard-hold or transferred to a punitive  
14 housing unit for 21 days, based on the facts alleged, the process he received was adequate.

15 The requirements of due process are "flexible and cal[1] for such procedural protections as the  
16 particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). Rather than rely on rigid  
17 rules, the United States Supreme Court has established a framework to evaluate the sufficiency of a  
18 particular process. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). The framework requires  
19 consideration of three distinct factors:

20 First, the private interest that will be affected by the official action; second, the risk of an  
21 erroneous deprivation of such interest through the procedures used, and the probable value,  
22 if any, of additional or substitute procedural safeguards; and finally, the Government's  
interest, including the function involved and the fiscal and administrative burdens that the  
additional or substitute procedural requirement would entail.

23 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

24 Importantly, the private interest at stake must be considered in the context of the prison system,  
25 where prisoners have their liberty curtailed by definition, and thus procedural protections are necessarily  
26 more limited. *Wilkinson*, 545 U.S. at 225. In *Wilkinson*, the Supreme Court found that indefinite  
27 solitary confinement in an Ohio "supermax" facility, which resulted in an automatic denial of parole,  
28 created a constitutionally protected liberty interest. *Id.* at 224. However, the Supreme Court found the

1 state's "informal, nonadversary procedures," which did not allow calling witnesses, adequately  
 2 safeguarded an inmate's liberty interest in not being assigned indefinitely to the supermax facility. *Id.* at  
 3 228-29. Allowing inmates a rebuttal opportunity "safeguard[ed] against the inmate's being mistaken for  
 4 another or singled out for insufficient reason." *Id.* at 226.

5 Here, Plaintiff was placed on yard hold on September 28, 2006, and subsequently transferred to  
 6 Unit 8 on October 9, 2006. (Exhibit A; Exhibit B at 3.) Plaintiff was provided a copy of the RVR on  
 7 October 10, 2006. (Exhibit A.) On October 30, 2006, a hearing was held on the RVR. (*Id.*) At the  
 8 hearing, the reviewing officer found Plaintiff not guilty of refusing to obey an order to double-cell,  
 9 dismissed the RVR, and determined that further disciplinary action against Plaintiff was unnecessary.  
 10 (*Id.*)

11 Given the government's significant interest in prison security, and viewing the private interest in  
 12 the context of the prison environment, these procedural protections adequately protect against an  
 13 "inmate's being mistaken for another or singled out for insufficient reason." *See Wilkinson*, 545 U.S. at  
 14 226. Indeed, the hearing officer here served such a purpose when he found Plaintiff not guilty of  
 15 refusing an order to double-cell, dismissed the RVR, and determined further disciplinary action against  
 16 him was unnecessary. (Exhibit A.) Thus, assuming *arguendo* Plaintiff had a constitutionally protected  
 17 liberty interest in not being placed on yard-hold or transferred to Unit 8 while the RVR was pending, the  
 18 procedural protections he received were sufficient to safeguard that interest. Accordingly, this Court  
 19 recommends Defendants' motion be **GRANTED** and the Fourteenth Amendment claims in Counts Five  
 20 and Seven be **DISMISSED**.

21 **F. Count Six**

22 Plaintiff claims Defendants Limon, Liles, Cowan, and Hernandez violated his Fourteenth  
 23 Amendment rights under the Due Process Clause when they issued him a RVR for failure to comply  
 24 with Operational Plan #85, without first notifying him that he was expected to abide by Operational Plan  
 25 #85 and that failure to do so would result in a transfer to a harsh lock-up and 24-hour isolation unit.  
 26 These allegations, however, are contradicted by both his allegations in relation to Count One and by his  
 27 own Exhibit A. Specifically, Plaintiff alleged he "was ordered to signed [sic] a double cell agreement or  
 28 ///

1 he would be placed on Yard hold and move [sic] to Unit 8 where no yard, library or other created  
 2 services are available.” (Complaint at ¶ 3.) Exhibit A, the RVR itself, states in pertinent part:

3 On Thursday, September 28, 2006 . . . I informed Inmate PARRA . . . that he had been  
 4 assigned to Double Cell status by I.C.C. I informed Inmate PARRA of Operational Plan #85,  
 5 Single/Double Cell Procedures, which states, in part, “Inmates are not entitled to single cell  
 6 assignment, housing location of choice, or cellmate of choice. An inmate is expected to  
 7 share occupancy with another inmate in a cell setting...unless staff determines that an  
 8 inmate’s case factors or security concerns warrant single cell assignment. I informed Inmate  
 9 PARRA that he would have to get a cellmate due to the overcrowding situation in ASU. I  
 (Exhibit A.)  
 10 also informed Inmate PARRA that his refusal to get a cellmate would result in him being  
 11 issued a CDC-115 for “Refusing to Obey Orders to Double-Cell.” I further advised Inmate  
 12 PARRA that a “Yard Hold” would be in effect, due to this pending CDC-115. Inmate  
 13 PARRA indicated he didn’t want a cell-mate, and refused to double cell, stating, “NO.”  
 14 Inmate PARRA is aware of this report.

15 When a complaint is accompanied by attached documents, the documents are part of the  
 16 complaint and may be considered in determining whether the plaintiff can prove any set of facts in  
 17 support of the claim. *Roth v. Garcia Marquez*, 942 F.2d 617, 625 n.1 (9th Cir. 1991). If the allegations  
 18 in the complaint are refuted by an attached document, the court need not accept the allegations as being  
 19 true. *Id.* Because the allegations in relation to Count One, as well as the information contained in  
 20 Exhibit A, directly contradict Plaintiff’s claim that he was not provided notice of the need to comply  
 21 with the order to double-cell, this Court does not accept Plaintiff’s allegation that he was not provided  
 22 notice as true. *See id.* Accordingly, this Court recommends Defendants’ motion be **GRANTED** and  
 23 Plaintiff’s claim in Count Six be **DISMISSED without leave to amend** because the pleading could not  
 24 be cured by the allegation of other facts. *See Lopez*, 203 F.3d at 1130..

## 25 G. Count Eight

26 Plaintiff claims Defendants Limon, Liles, Cowan, and Hernandez deprived him of his state-  
 27 created liberty interest in being classified as having “safety concerns” when they assigned him to double  
 28 cell with a general population inmate. However, prisoners do not have a constitutionally recognized  
 29 liberty interest in a particular security classification. *Hernandez v. Johnston*, 833 F.2d 1316, 1318 (9th  
 Cir. 1987); *see also Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). Accordingly, this Court  
 recommends Defendants’ motion be **GRANTED** and Plaintiff’s Fourteenth Amendment claims in  
 Count Eight be **DISMISSED without leave to amend** because the pleading could not be cured by the  
 allegation of other facts. *See Lopez*, 203 F.3d at 1130.

1     **H. State Law Claims**

2         Plaintiff alleges numerous state law causes of action against Defendants Limon, Liles, Cowan,  
 3 and Hernandez. Plaintiff also seeks to hold Defendant CDCR liable for the actions of the individual  
 4 defendants on the basis of a state law cause of action for vicarious liability.

5         Section 1983 “is not itself a source of substantive rights, but a method for vindicating *federal*  
 6 rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it  
 7 describes.” *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (emphasis added). A claim for violation  
 8 of state law is not cognizable under section 1983. *See Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir.  
 9 1990); accord *Ebmeier v. Stump*, 70 F.3d 1012, 1013 (8th Cir. 1995) (“We take this opportunity to  
 10 emphasize that violations of state laws, state-agency regulations, and . . . state-court orders, do not by  
 11 themselves state a claim under 42 U.S.C. § 1983.”). Thus, Plaintiff’s state law claims are not cognizable  
 12 under section 1983, and are only before this Court pendant to Plaintiff’s claims based on federal law.

13         **1. Defendants Limon and Liles**

14         Here, as discussed above, Plaintiff’s federal claims against Defendants Limon and Liles must be  
 15 dismissed from the complaint because he fails to state a cognizable claim for relief under § 1983. When  
 16 federal law claims are removed from a lawsuit before trial and only state law claims remain, the balance  
 17 of factors to be considered under the pendant jurisdiction doctrine will usually point toward declining to  
 18 exercise jurisdiction over the remaining state law claims, and to dismiss the claims without prejudice.  
 19 *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *see also United Mine Workers of*  
 20 *America v. Gibbs*, 383 U.S. 715, 726 (1966) (“if the federal claims are dismissed before trial . . . the state  
 21 claims should be dismissed as well”). In view of this Court’s determination that Plaintiff fails to state a  
 22 cognizable claim for relief under § 1983 against Defendants Limon and Liles, this Court refrains from  
 23 determining the propriety of his state law claims against these defendants, sued in their personal  
 24 capacities, until such time as he files a viable federal claim. Accordingly, it is recommended the Court  
 25 decline to exercise jurisdiction over Plaintiff’s state law claims against Defendants Limon and Liles and  
 26 that these claims be **DISMISSED without prejudice**. *See* 28 U.S.C. 1367(c)(3).

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1           **2. Count Sixteen - Claims against Defendants Cowan and Hernandez**

2           Plaintiff alleges a state law cause of action against Defendants Cowan and Hernandez for  
 3 enforcing Operational Plan #85 without first notifying him that he was expected to abide by Operational  
 4 Plan #85 and that failure to do so would result in punishment.<sup>6</sup> However, for the reasons stated above in  
 5 relation to Count Six, this Court recommends Defendants' motion be **GRANTED** and Plaintiff's claims  
 6 in Count Sixteen be **DISMISSED without leave to amend** because the pleading could not be cured by  
 7 the allegation of other facts. *See Lopez*, 203 F.3d at 1130..

8           **3. Count Seventeen - Claims against Defendants Cowan and Hernandez**

9           Plaintiff claims Defendants Cowan and Hernandez are liable for their alleged failure to comply  
 10 with California Government Code § 11340.5(a) prior to enforcing Operational Plan #85. Plaintiff,  
 11 however, fails to state a cognizable claim for relief against Defendants Cowan and Hernandez because  
 12 California Government Code § 11340.5(a) imposes a duty on a "state agency," not on individuals.<sup>7</sup> *See*  
 13 Cal. Govt. Code § 11340.5(a); *cf. Donaldson v. Department of Real Estate of State of Cal.*, 134 Cal.  
 14 App. 4th 948, 966-67 (Cal. Ct. App. 2005) (discussing whether the Department of Real Estate could  
 15 validly enforce certain regulations in light of § 11340.5(a)). Accordingly, this Court recommends  
 16 Defendants' motion be **GRANTED** and Plaintiff's claims in Count Seventeen be **DISMISSED without**  
 17 **leave to amend** because the pleading could not be cured by the allegation of other facts. *See Lopez*, 203  
 18 F.3d at 1130.

19           **4. Defendant CDCR**

20           Plaintiff alleges claims for vicarious liability under California Government Code § 815.2 against  
 21 Defendant CDCR, a state agency, based upon the alleged tortious acts of the individual defendants.

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 23           <sup>6</sup> Because this Court recommends the state law causes of action against Defendants Limon and  
 24 Liles be dismissed without prejudice because Plaintiff has failed to state a viable federal claim against  
 25 these defendants, the Court does not discuss these defendants in relation to Counts Sixteen and  
 26 Seventeen.

27           <sup>7</sup> California Government Code § 11340.5(a) states the following:

28           No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion,  
 29 bulletin, manual, instruction, order, standard of general application, or other rule, which is  
 30 a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual,  
 31 instruction, order, standard of general application, or other rule has been adopted as a  
 32 regulation and filed with the Secretary of State pursuant to this chapter.

1 Plaintiff does not allege an independent basis of federal jurisdiction against the CDCR, but instead relies  
 2 upon his federal claims against the individual defendants to provide pendant jurisdiction. It is well  
 3 established that under the Eleventh Amendment, state agencies are immune from private damage actions  
 4 or suits for injunctive relief brought in federal court, except to the extent a State voluntarily waives its  
 5 immunity or Congress authorizes such a suit. *See, e.g., College Sav. Bank v. Florida Prepaid*  
 6 *Postsecondary Educ. Expense Bd.* 527 U.S. 666, 670 (1999). Here, the California law in question does  
 7 not contain a provision authorizing suit in federal court, *see* California Government Code § 815.2, nor  
 8 was § 1983 intended to abrogate a State's Eleventh Amendment immunity, *Kentucky v. Graham*, 473  
 9 U.S. 159, 169 n.17 (1985). Accordingly, this Court recommends the state law claims against Defendant  
 10 CDCR be **DISMISSED sua sponte**. Furthermore, it is appropriate to dismiss the state law claims  
 11 against Defendant CDCR **without leave to amend** because the pleading could not be cured by the  
 12 allegation of other facts. *See Lopez*, 203 F.3d at 1130.

#### IV. CONCLUSION

Having reviewed the matter, this Court recommends:

1. Defendants' Motion to Dismiss be **GRANTED**.
2. Plaintiff's Eighth Amendment claims listed in Counts One through Three, in relation to Defendants Limon and Liles, be **DISMISSED**.
3. Plaintiff's First Amendment retaliation claim in Count One be **DISMISSED without leave to amend**.
4. Plaintiff's claims in Count Four be **DISMISSED without leave to amend**.
5. Plaintiff's claims in Counts Five and Seven be **DISMISSED**.
6. Plaintiff's claims in Counts Six and Eight be **DISMISSED without leave to amend**.
7. The Court decline to exercise jurisdiction over Plaintiff's state law claims against Defendants Limon and Liles and that Counts Nine through Sixteen, and Eighteen, in relation to Defendants Limon and Liles, be **DISMISSED without prejudice**.
8. Plaintiff's claims in Counts Sixteen and Seventeen, in relation to Defendants Cowan and Hernandez, be **DISMISSED without leave to amend**.

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1       9. All claims against Defendant CDCR be **DISMISSED sua sponte without leave to amend.**

2       10. Defendant CDCR's Motion to Dismiss be **DENIED as moot.**

3       11. Plaintiff be given **thirty days** from the date the final order regarding Defendants' Motion is  
4 entered to file and serve a First Amended Complaint. Leave to amend should only be granted as to the  
5 previously brought claims for the purpose of curing pleading deficiencies. No new claims should be  
6 alleged. Plaintiff should be warned that the First Amended Complaint will be his final pleading.

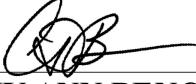
7              This Report and Recommendation of the undersigned Magistrate Judge is submitted to the  
8 United States District Judge assigned to this case, pursuant to 28 U.S.C. § 636 (b)(1).

9              IT IS ORDERED that no later than **August 25, 2008**, any party to this action may file written  
10 objections with the Court and serve a copy on all parties. The document should be captioned  
11 "Objections to Report and Recommendation."

12              IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and  
13 served on all parties **within 10 days** of being served with the objections.

14              **IT IS SO ORDERED.**

15  
16 DATED: July 22, 2008

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18   
CATHY ANN BENCIVENGO  
United States Magistrate Judge

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